

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-2130

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P/S
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT BROWN,

Petitioner-Appellant,

- against -

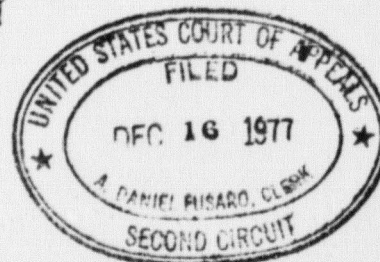
MELVYN TANENBAUM, a Judge of the County Court of the
State of New York, Suffolk County, HENRY F. O'BRIEN,
District Attorney of Suffolk County, BENJAMIN WARD,
Commissioner of Corrections of the State of New York,
and the SHERIFF OF THE COUNTY OF SUFFOLK,

Respondents-Appellees.

JOINT SUPPLEMENTARY APPENDIX

HENRY F. O'BRIEN
District Attorney of
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Center Drive South
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(516) 727-1440

MARK D. COHEN and STEVEN A. HOVANI
Assistant District Attorneys
of Counsel



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COUNTY COURT OF SUFFOLK COUNTY, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a DANIEL
BOOKS, a/k/a DANIEL BOOKS, DANIEL BOOKS,
a/k/a DANIEL BOOKS, DANIEL BOOKS, DANIEL BOOKS,
a/k/a DANIEL BOOKS, DANIEL BOOKS, DANIEL BOOKS,
Defendants.

NOTICE OF MOTION

Ind. # 555-72
attest

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavits of ROBERT BROWN [REDACTED], [REDACTED] duly sworn to the 8th day of July, 1972, and upon the search warrant dated and issued on the 22nd day of March, 1972 by Hon. FRANK CHIESO, Judge of the County Court, Suffolk County, and upon the affidavit of Detective RICHARD CIRILLO, sworn to the 22 day of March, 1972, and upon all of the papers, pleadings and proceedings heretofore had herein, the undersigned will move this court, at a Term for Motions thereof, to be held at the courthouse, Riverhead, New York, on the 8th day or **AUGUST** 1972, at 9:30 O'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order controverting and repealing the aforementioned search warrant, and suppressing any property obtained by means of the search made pursuant to said search warrant, as evidence against the above named defendants herein, and for the return to the said defendants of any property seized as a result of such unlawful search and seizure other than blatant contraband, on the grounds that:

- (a) there was no probable cause for the issuance thereof;
- (b) the same was issued unlawfully and illegally;
- (c) there was no prior adversary proceeding to warrant the issuance thereof;
- (d) there was no prior judicial scrutiny;
- (e) same was obtained by fraud and deceit;
- (f) there was no basis in fact or in law to declare the seized merchandise as "obscene";
- (g) the Detectives exceeding the search warrant went beyond the scope thereof.

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and for such other, further and different relief as to the Court
may seem just and proper.

Dated, New York, July 12, 1972.

Yours, etc.,

FLOYD CARLSON
Attorney for defendants
OVERSTOCK BOOK CO., INC.,
etc., and ROBERT BROWN,
37 Marned Road
Schenectady, New York

ROBERT J. GALT
Attorney for defendant
EAC MFG., etc.
335 Broadway
New York, N.Y. 10007

JOHN CARLOS FORST
Attorney for defendant
JAMES BROWN
1040 City National Bank Bldg.
Miami, Florida 33130

cc: Hon. GEORGE J. W. LINDSAY
District Attorney
County of Suffolk.

U C

Y COURT OF THE COUNTY OF SUFFOLK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, BANC PANAS,
a/k/a GUS, BARRY BROWN and ROBERT BROWN,

Defendants.

STATE OF NEW YORK

COUNTY OF

)
) SS:
)

ROBERT BROWN, being duly sworn, deposes and
says:

I am one of the defendants in the above en-
titled action. I am also president of the Corporate Defendant,
Overstock Book Co., Inc.

I make this affidavit in support of the
motion to controvert the search warrant issued by this court on
March 22, 1972, and to suppress evidence obtained by reason of the
aforesaid search warrant.

I am fully acquainted with all of the facts
and circumstances leading to the issuance of the subject search
warrant dated and issued on March 22, 1972, by HON. FRANK GATES,
Judge of the County Court of Suffolk County. I am also fully
acquainted with the seizure made by detectives of the District
Attorney's Office in carrying out the said search warrant.

It is respectfully contended that the search
warrant was issued unlawfully and illegally, without probable
cause for the issuance thereof on all of the grounds set forth
in the enclosed Notice of Motion.

It is respectfully called to the attention
of this court that the affidavit of detective investigator
RICHARD CIRILLO, Shield No. 30, of the Suffolk District

question of law

Attorney's Office, assigned to the Rackett Bureau, fails to show probable cause for the issuance of the subject search warrant. The officer's affidavit is based on the officer's conclusions that the subject material is obscene. The affidavit in no way justifies the reasoning behind the conclusion reached and thus is entirely inadequate to justify the issuance thereof.

question of law

It is further respectfully contended that none of the elements enunciated by the U. S. Supreme Court in its decisions defining obscenity have been shown or explained.

(c)
question of law

I am informed and verily believe that the U. S. Supreme Court has enunciated the principle that an adversary hearing is constitutionally required prior to the seizure, purchase or arrest for selling or possession with intent to sell, of even a limited number of allegedly obscene materials by a law enforcement officer acting with or without a search warrant.

question of law

While the affidavit of officer Cirillo states that the court was shown publications purchased by him, there is nothing in the search warrant to indicate that the court has used the guidelines set forth by the U. S. Supreme Court in arriving at the conclusion that "there is probable cause to believe that there is located at the premises of Overstock Book Co., Inc.....at 619 Acorn Street, Deer Park, County of Suffolk, State of New York, property the possession of which is unlawful, property constituting evidence of crime and intending to show that a particular person committed the crime, property used and possessed with the intent to be used as a means of committing the crime".

(c)
question of law

It is further respectfully contended that the search warrant is unlawful and illegal in that same was obtained and issued by the fraud and deceit of officer Cirillo in that said officer, in order to obtain copies of the various publications set forth in his affidavit, used false and misleading names and addresses for the obtaining thereof.

(F)

It is further respectfully contended that the Judge issuing the subject search warrant had no basis in fact or in law to declare the seized merchandise as "obscene".

I am informed and verily believe that the U. S. Supreme Court has, in numerous decisions, denounced law enforcement officers who believe themselves censors of the community by making their own determination as to what material is "obscene" and seizing same.

question 1/aw

It is additionally urged that the court exceeded its authority in issuing the aforesaid warrant by its direction concerning the seizure of "Billings and invoices disclosing, promoting and distribution of the aforesaid publications and records and documents disclosing the manufacturer or publisher of the aforesaid publications, and any other records and documents disclosing the individuals responsible for the manufacture, publication or distribution of the aforesaid publications.

The court by its aforesaid direction concerning the seizure of the business records aforesaid, has constituted the said seizure as a "mass seizure" which has often been denounced by the U. S. Supreme Court.

question 1/aw

Further, by the court's direction for the seizure of the business records aforesaid, the prohibition against a person being forced to testify against himself (Fifth Amendment) has been violated, thus making the search warrant unlawful and illegal.

(9)

In view of all of the aforesaid and further, by reason of the fact that the search went beyond the scope of the search warrant, it is respectfully contended and urged that the warrant be controverted and that the property seized by direction of said search warrant be suppressed from being used as evidence and be ordered returned to the defendants herein.

Sworn to before me this

day of June, 1972.

ROBERT BROWN

THOMAS SARISOHN
Notary Public, State of New York
Qualified in Suffolk County
Term Expires March 30, 1973

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COUNTY COURT
COUNTY OF SUFFOLK

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK
TO ANY PEACE OFFICER IN THE COUNTY OF SUFFOLK

Proof by affidavit having been made this day before me by Detective Investigator Richard Cirillo, Shield #30, of the Suffolk County District Attorney's Office, assigned to the Rackets Bureau, that there is probable cause to believe that there is located at the premises of OVERSTOCK BOOK COMPANY, INC., a/k/a TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS, at 519 Acorn Street, Deer Park, County of Suffolk, State of New York, property the possession of which is unlawful, property constituting evidence of crime, and intending to show that a particular person committed the crime, property used and possessed with the intent to be used as a means of committing a crime.

YOU ARE THEREFORE commanded, between 6:00 A.M. and 9:00 P.M., to make an immediate search of the premises previously described for six copies of each of the following publications:

"HOMOSEXUAL SEXUALITY, VOLUME 1"; "HOMOSEXUAL SEXUALITY, VOLUME 2"; "HOMOSEXUAL SEX TECHNIQUES FIRST BOOK"; "HOMOSEXUAL SEX TECHNIQUES SECOND BOOK"; "STUDIES IN DANISH MALE HOMOSEXUAL PORNOGRAPHY, VOLUME 1"; "THE YOUNG HOMOSEXUAL"; "MALE HOMOSEXUAL MARRIAGES"; "MUTUAL MASTURBATION, VOLUME 1, NUMBER 1"; "MUTUAL MASTURBATION, VOLUME 1, NUMBER 2"; "YOUNG BOYS AND SOLICITY"; "CALL BOY"; "YOUNG BOYS AND SEX PLAY, VOLUME ONE"; "YOUNG BOYS AND

SEX PLAY, VOLUME TWO"; "TEENAGE MASTURBATION"; "YOUNG BOYS AND ORAL SEX"; "YOUNG BOYS AND SEX REVIEW"; "BOYS TOGETHER, 2"; "TRYST, ISSUE 1"; "THE ART AND HISTORY OF FELLATIO, SEXUALITY SERIES NO. 2"; "THE ART AND HISTORY OF SEX SEDUX, SEXUALITY SERIES NO. 1"; "MARITAL SEX PRACTICES, VOLUME 1"; "MARITAL SEX PRACTICES, VOLUME 2"; "THE SIMPLE ACT OF SEX, VOLUME ONE"; "INTERCOURSE"; "PICTORIAL MANUAL OF PRIMARY POSITIONS"; "PICTORIAL MANUAL OF SECONDARY POSITIONS"; "SEXUAL FOCUS, VOLUME 1, NO. 1"; "THE JOURNAL OF SEX, VOLUME 1, NO. 1"; "DUET NO. 1"; "PARTY TIME NO. 1"; "THE EFFECTS OF DANISH PORNOGRAPHY"; "FEMALE PEDOPHILIA"; "THE SEXUAL THREESOMES"; "ANAL SEX"; "MASTURBATION"; "TROLLISM"; "SEX FULFILLMENT"; "ORAL SEX"; "LOVE PLAY"; "HANDBOOK OF SEX VARIETY"; "THE FEMALE ORGASM"; "THE NEW MORALITY, VOLUME ONE, NUMBER ONE"; "A REPORT ON GROUP SEX"; "THE ART OF CUMHILINGUS"; "STUDIES IN DANISH MALE HOMOSEXUAL PORNOGRAPHY, VOL. 2"; "THE SENSUOUS COUPLES, EUROPEAN SERIES 103"; also billings and invoices disclosing the promoting and distribution of the aforesaid publications, and records and documents disclosing the manufacturer or publisher of the aforesaid publications, and any other records and documents disclosing the individuals responsible for the manufacture, publication or distribution of the aforesaid publications, and if you find such property as previously described or any part thereof, bring it before me at the County Court, Town of Riverhead, County of Suffolk and State of New York.


 Judge of the County Court
 Suffolk County

Dated, County of Suffolk
 State of New York
 the 22nd day of March, 1972.

COUNTY COURT : COUNTY OF SUFFOLK

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THE PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, BANO PANAS,
a/k/a GUS, BARRY BROWN and ROBERT BROWN,

Defendants.

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MEMORANDUM OF LAW ON BEHALF
OF DEFENDANTS RESPECTING THE
MOTION OF DEFENDANTS TO CON-
TROVERT THE SEARCH WARRANT.

In the memorandum of law submitted by the District Attorney of Suffolk County, it is his contention that the motion papers are insufficient on their face and that the motion should be dismissed.

We take the contrary view and urge that the motion papers satisfy the requisite statute and that a hearing on the motion be ordered and held.

It is significant to note that nowhere in the affidavit of Detective Investigator Richard Cirillo is there a statement to the effect that the allegedly obscene books were judicially scrutinized by Judge Frank Gates who issued the search warrant.

Nor does the warrant itself, issued by Judge Gates make mention that would lead one to believe that he personally examined the books in question. A reading of the

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warrant is indicative of the fact that the court, in issuing the warrant, relied solely on the affidavit of Detective Investigator Richard Cirillo. To quote from the warrant:

"Proof by affidavit having this day been made before me by Detective Investigator Richard Cirillo, shield #30, of the Suffolk County District Attorney's Office, assigned to the Rackets Bureau, that there is probable cause to believe that there is located at the premises of Overstock Book Company, Inc., a/k/a Timely Books, a/k/a Beautiful Books, at 519 Acorn Street, Deer Park, County of Suffolk, State of New York, property the possession of which is unlawful, property constituting evidence of crime, and intending to show that a particular person committed the crime, property used and possessed with the intent to be used as a means of committing a crime."

A further reading of the search warrant clearly indicates the titles of the books and other matter ordered to be seized. The warrant, however, fails to state that the publications and other matter to be seized are obscene or contraband. Nowheres in the said search warrant is there any evidence or indication that there was judicial scrutiny of the material ordered to be seized and its appearing to the Court to be obscene and the reason therefor.

It is obvious from the statement aforesaid that there is a question of fact presented to this Court as to whether there was prior judicial scrutiny so as to constitute probable cause for the issuance of the warrant. Such question of fact can only be determined at a hearing. The mere statement in the affidavit of Detective Investigator Cirillo that

he showed the books to the court is not proof positive that the Judge he showed the books to was in fact Judge Gates.

To press the point further, there is nothing in the affidavit of Detective Investigator Cirillo to indicate if the Court was shown all of the books at one time or whether the Court viewed the books at different intervals. That too is a matter of proof and concern to the defendants for the time element may very^{WELL} coincide with decisions of the United States Supreme Court affecting the books in question or books of a similar nature.

It is because of the lack of clarity of the affidavit of Detective Investigator Cirillo and the search warrant itself that the notice of motion raised the points labeled:

- (d) there was no prior judicial scrutiny;
- (f) there was no basis in fact or in law to declare the seized merchandise as obscene.

It follows from the above that if the Judge who examined the subject books was in fact a Judge other than the Judge who issued the warrant, or, if only a cursory examination of the subject books was made, that the hearing could very well prove that "there was no basis in fact or in law to declare the seized merchandise as obscene".

It is certainly not incumbent upon the defendants to reveal their complete line of attack in the motion papers themselves, otherwise there would be no need for hearings on motions to suppress. Deciding a motion of this kind with-

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out a hearing would pre-suppose that the parties to the litigation have agreed to a state of facts and that the law as to obscenity is definite and certain. In this particular case no state of facts has been agreed to and the law of obscenity is still unsettled and uncertain.

AS TO THE EXECUTION OF THE WARRANT

The law is well settled that a search warrant must be executed fastidiously and exactly as called for. The officers executing the warrant must not and may not exceed the authority given to them by such warrant. Failure to execute the warrant within the scope thereof is just cause for the vacating and dismissal of the warrant.

Subdivision (g) of the motion to controvert the warrant asks for the suppression of the evidence seized under the warrant on the ground that "the Detectives executing the search warrant went beyond the scope thereof." A careful reading of the Memorandum submitted by the District Attorney studiously avoids any reference whatever to this contention of the defendants. The defendants are prepared to prove that more than was called for in the warrant was seized by the officers executing the warrant and that such excessive seizure exceeded the authority granted to the officers by the warrant, thus rendering the warrant illegal and ineffective. Here again is proof positive that these matters can only be brought out at a hearing and that a hearing cannot be denied

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to the defendants summarily.

AS TO PRIOR ADVERSARY PROCEEDINGS

The ruling in Vergari (208 Cinema, Inc., et al, Appellants v. Carl A. Vergari etc, U.S.C.A. 2d circuit, October 9, 1969; 2/22/70, Docket 856, 38 L.W. 3338.... facts reported in 298 F.2. 1175, Judge Pollack) is subsumed by the ruling of the U.S. Supreme Court in ONE QUANTITY OF BOOKS v. KANSAS, 378 U.S. 205. There a search warrant was issued for the seizure of written material described in an information which alleged 59 titles of novels which were described as obscene.

In an ex parte hearing before a judge lasting 45 minutes, the Judge examined seven books carrying a designation on them to the effect that 'this is an original night stand book.' The Judge determined that the seven books were obscene and granted a search warrant for the seizure of all books described and set forth in the information. The police executed the search warrant and seized all copies of the books. At a later hearing where the owner was represented, the books were declared obscene.

The State argued that obscene books are similar to contraband. Mr. Justice Brennan, joined by three other Justices, held that prior restraint was created by the issuance of the search warrant and the execution thereof causing a removal of the books from circulation, all without the

prior adversary proceeding.

It was held that this violated the First Amendment to the Federal Constitution. It was held that the search warrant procedure or the ex parte order authorizing a seizure was an impermissible form of pre-censorship. The Court said that the procedure was not saved because a hearing was afforded after the seizure. Justices Black and Douglas concurred in the conclusion of the four Justices that held, as described above, but solely on the ground that the procedure violated the First Amendment.

See also "First Amendment Due Process", 83 Harvard Law Review, page 518, No. 3, January, 1970. On pages 533 to 535 of 83 Harvard Law Review, *supra*, it was stated in part, as follows:

"Ex parte seizures of materials are closely akin to ex parte restraints against speech, and not surprisingly, the Court has been increasingly sensitive to the necessity for a prior adversary hearing in the latter area.

In *Freedman* (380 U.S. at 59) the Court was careful to observe that 'any restraint imposed in advance of a final judicial determination on the merits must..... be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. The cases upon which *Freedman* relied, particularly *A QUANTITY OF BOOKS v. KANSAS*, plainly suggests that the propriety of any interim restraint should be conditioned on the availability of a prior adversary hearing. The justification for this requirement need not be labored. The requirement of a prior adversary hearing sharply reduces the chances of an erroneous injunction. At such a hearing, the Judge will not only receive a more accurate description of the

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relevant factual considerations that is ordinarily available at an ex parte hearing, but his attention will also be directed to the relevant legal principles. In addition, the adversary hearing will insure that any injunction order which issued will be 'tailored as precisely as possible to the exact needs of the case'."

On February 9, 1970, in State v. Scott, Texas District Court, reported in Six Criminal Law Review, 2423, 2424, the search warrant procedures authorized by the state to seize obscenity were held to be violative of the First Amendment. It was stated, in part, in that opinion, that

"Section 9 of Article 327..... of the Texas Penal Code is unconstitutional in that it specifically sets forth an ex parte search warrant procedure in violation of the following cases:

Marcus v. Search Warrants 367 U.S. 718;
A Quantity of Books v. Kansas, 378 U.S. 205;
Fontaine v. Dial, 303 M Supp. 436 (three
Judge U.S.D.C. W Texas)
Tyron, Inc. v. Wilkinson, 410 F. 2d 639...
and numerous other cases, all requiring a
prior adversary determination of the obscene
nature of the press materials involved be-
fore any search, seizure, arrest or any other
criminal process can be instituted against
press materials."

ONLY A HEARING CAN RESOLVE THE
MOTION TO CONTROVERT THE WARRANT
AND THEREFORE A HEARING SHOULD BE
ORDERED TO BE HELD.

Respectfully submitted,
FLOYD SARISON
MERRIS J. EZRA
JOEL HIRSCHHORN
Attorneys for Defendants.

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COUNTY COURT : COUNTY OF SUFFOLK

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment

No. 555-72

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, BANO PANAS,
a/k/a GUS, BARRY BROWN and ROBERT BROWN,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION
TO A MOTION TO CONTROVERT AND
SUPPRESS.

The defendants were indicted on April 28, 1972. The OVERSTOCK BOOK CO., INC., BARRY BROWN and ROBERT BROWN were arraigned on May 10, 1972 before County Judge Ernest Signorelli, and they were given twenty days to make motions. The defendant PANAS was arraigned on June 22, 1972 before County Judge Pierre Lundberg, and he was given ten days to make motions.

The defendants now move for an order controverting the search warrant issued by County Judge Frank Gates on March 23, 1972, and suppressing any property obtained as a result of the search made pursuant to the warrant.

Section 710.60 of the Criminal Procedure Law requires that the motion papers in support of a motion to suppress must state the ground or grounds of the motion and must contain sworn allegations of fact supporting such grounds. Section 710.65 also states that the court may summarily deny the motion if the motion

papers do not allege a ground constituting legal basis for the motion; or the sworn allegations of fact do not as a matter of law support the ground alleged.

If the court is not required to summarily grant the motion, or in its discretion it does not summarily deny the motion, then it must order that a hearing be conducted to determine any issues of fact that are raised in the motion.

The law in New York is that the affidavit in support of a motion to suppress must raise an issue of fact which requires resolution by way of a hearing. The issue of fact cannot be raised by mere conclusory statements. People v. Salinas, 18 N.Y.2d 477, 276 N.Y.S.2d 882 (1965); People v. Childers, 54 Misc.2d 752, 283 N.Y.S.2d 336 (Queens County Supreme Court 1967); People v. Catrambone, 41 Misc.2d 282, 245 N.Y.S.2d 742 (Queens County Supreme Court 1963); People v. Rooks, 229 N.Y.S.2d 923 (New York County Court of General Sessions 1962).

The hearing is limited to the issue of fact raised in the affidavit. People v. Correlli, Vetrano and Dolcemaschio, Memorandum Decision of Suffolk County Judge Lipetz, dated May 15, 1970.

The affidavit in support of this motion does not place in issue the truth of any facts set forth in the affidavit in support of the search warrant. The affidavit raises questions of law only. These can be resolved by a judge without the necessity of a hearing.

The first allegation made in the affidavit in support of this motion is that there was no probable cause for the issuance

of the search warrant. This allegation is without merit. The search warrant was issued only after the detective obtained and examined personally each publication which was directed to be seized by the court.

The affidavit in support of the search warrant states that the detective personally examined each publication and further states the various depictions of sexual activity that were contained in these publications. Additionally, Judge Gates issued a search warrant only after personally examining all the publications which were the objects of the warrant.

The Second Circuit Court of Appeals in Overstock Book Co., Inc. v. Barry and Aspland stated that a judge of the Suffolk County Court was justified in issuing a search warrant where he was not shown the publication, but the affidavit in support adequately described materials which were hardcore pornography. 436 F.2d 1289 (C.A. 2 1970).

Here, there was "prior judicial scrutiny" before the warrant was issued, which is all that is required. People v. Heller, 29 N.Y.2d 319, 327 N.Y.S.2d 628 (1971); People v. Steinberg, 60 Misc.2d 1041, 304 N.Y.S.2d 858 (Westchester County Court 1969); People v. East Island News Corp., et al., 307 N.Y.S.2d 336 (Suffolk County District Court 1969).

The next allegation in support of this motion is that none of the elements enunciated by the United States Supreme Court in its decisions defining obscenity have been shown or expounded.

As stated above, Judge Gates issued the search warrant only after personally examining all the publications. The judge is certainly familiar with the elements of obscenity as stated in the Penal Law of the State of New York and as enunciated by the Supreme Court in its decisions. After examining the publications it was clear to the judge that there was probable cause to issue the search warrant. Therefore, there is no merit to this allegation of the defendants.

The defendants' next allegation is that the search warrant should be controverted and the evidence suppressed because there was no prior adversary hearing prior to the issuance of the search warrant. The law in New York is that a prior adversary hearing is not required. People v. Heller, supra; People v. Steinberg, supra; People v. East Island News Corp., et al., supra. Therefore, this allegation of the defendants is without merit.

The next allegation of the defendants seems to be a repetition of their second allegation, that the court did not take into account the guidelines set forth by the Supreme Court in arriving at its conclusion that the publications were obscene. Of course, this is a mere conclusory statement on the defendants' part unsupported by any facts within the knowledge of the defendants and, therefore, it is without merit.

The next allegation of the defendants is that the search warrant is unlawful because Detective Investigator Cirillo used false and misleading names and addresses to obtain the publications which were the objects of the warrant. This

contention is equally without merit, for certainly the defendants would not have sold the publications to Detective Investigator Cirillo of the Suffolk County District Attorney's Office. If this contention of the defendants had any validity, a police officer would no longer be allowed to operate in an undercover capacity.

The next allegation of the defendants is that the judge issuing the search warrant had no basis in fact or in law to declare the seized merchandise as obscene. This again is a question of probable cause, which was resolved when Judge Gates decided to issue the warrant.

The next allegation of the defendants is that the direction in the warrant for the seizure of the business records of the defendant OVERSTOCK BOOK CO., INC. rendered the seizure a mass seizure, and for that reason the warrant should be controverted and the evidence suppressed. This allegation is also without merit. The warrant calls for the seizure only of those records that specifically related to the: promotion and distribution; manufacturer and publisher; and the individuals responsible for the manufacture, publication and distribution of the publications.

In G.I. Distributors v. Murphy, which was decided by the United States District Court for the Southern District of New York on January 19, 1972, the Court ordered the State to return all the business records seized except for three hundred thirty (330) items which were to be used as evidence in the State prosecution. The Court said that the distributor was as effectively prevented from distributing by having its records or orders for

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magazines seized, without which it was unable to make any distribution, as it was by the seizure of the magazines themselves. 10 Crim. Law Rep. 2427 (1972).

In that case the State seized all of the business records of the defendant. Here, the only records seized were those that related to the particular magazines that were seized. Therefore, this was not a massive seizure as was the case in G.I. Distributors, v. Murphy. Additionally, at the defendants' request the District Attorney's Office agreed to and did supply the defendants with photocopies of all records that we seized.

Even if this were a massive seizure, it would be an infringement of the defendants' First Amendment rights only. This infringement would not require the suppression of the material seized with regard to the present prosecution. The remedy would be an order for the return of the property seized except that property which is to be legitimately used for evidence. U.S. v. Canclano, 11 Crim. Law Rep. 2341 (C.A.2 1972).

The next allegation is that by seizure of the business records the Fifth Amendment was violated. This allegation is without merit as the business records belong to the corporation and a corporation has no Fifth Amendment privilege.

CONCLUSION:

THE COURT SHOULD SUMMARILY DENY THE DEFENDANTS' MOTION WITHOUT ORDERING A HEARING.

Respectfully submitted,

GEORGE J. ASPLAND
DISTRICT ATTORNEY
SUFFOLK COUNTY

IRA HARRIS SIMON
Assistant District Attorney
of counsel

Dated: August 18, 1972

MEMORANDUM

Indictment No. 556-72

COUNTY COURT, SUFFOLK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

VS

OVERSTOCK BOOK CO., INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL
BOOKS, RAND PAPER, a/k/a GUN,
BARRY BROWN & ROBERT BROWN, Defts.

SON. GEORGE J. ASPLAND
District Attorney
Suffolk County
Riverhead, New York 11901

SARISCHON, THIRMAN & SARISCHON
MORRIS J. HERR, Esq.
JOEL HIRSCHMAN, Esq.
Attorneys for Defendants
67 Harned Road
Commack, New York 11735

Part III

BY

Gates

J.

DATED

September 20,

1972

Motion to controvert a search warrant issued by this Court and to suppress property obtained by means thereof.

The motion is supported by an affidavit made by defendant, consisting primarily of legal argument alleging, inter alia, that an adversary hearing should have been held prior to the issuance of the warrant.

The subject of the search warrant was six copies each of several publications pertaining to human sexuality in various manifestations and records and documents disclosing the individuals responsible for the manufacture, publication and distribution of said publications.

This Court issued the search warrant after scrutinizing each of said publications and thereupon determining that there was probable cause for the issuance of the search warrant.

This procedure was approved by the New York Court of Appeals in People v. Heller, 29 N.Y. 2d 319, which affirmed the conviction of the exhibitor of the film "Blue Movie". The appellant had attacked the warrant because an adversary hearing was not held prior to the issuance thereof.

MEMORANDUM

Indictment No. 885-72

COUNTY COURT, SUFFOLK COUNTY

22

THE PEOPLE OF THE STATE OF NEW YORK,

BY

J.

VS

DATED

September 10 1972

EVERSTOCK BUCK CO., INC.

Page #1

The Court of Appeals held that an adversary hearing is not required either before or after the issuance of the warrant where the warrant was preceded by judicial scrutiny and was the result of a judicial determination, citing: Marcus v. Search Warrant (367 U.S. 717, A Quantity of Books v. Kansas (378 U.S. 205) and Lee Art Theatre v. Virginia (392 U.S. 836.)

The following quotation from People v. Heller (supra at page 823) is pertinent:

"There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a Magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to begin a prosecution.

But when a Magistrate sees a film, it is not much help to him, or indeed to the parties, in deciding probable cause to have counsel on one side tell him what he has just seen is obscene and on the other that it is not. He is deciding, on the warrant question, not guilt or innocence, but the prima facie sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion.

There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has

MEMORANDUM

Index No. 155/72

COUNTY COURT, SUFFOLK COUNTY

23

THE PEOPLE OF THE STATE OF NEW YORK,

BY

J.

VS

DATED October 26,

1972

OVERSTOCK BOOK CO., INC.

From a final adversary determination on the merits whether it violates the statute. The order should be affirmed."

In People v. Abramovitz, 31 N.Y. 2d 160 the New York Court of Appeals reversed the denial by a County Court of a motion to suppress two magazines. Said magazines were seized by police under a warrant which did not name said magazines but permitted the police to search for and seize any material which depicted "scenes of nude persons" and which "expose the female and male genital organs, the female and male pubic areas, including the male penis and the female breasts".

The Court of Appeals in its opinion referred to People v. Rothberg, 10 N.Y. 2d 35, as the leading case "in this Court" and quoted therefrom as follows:

"The sole defect is that the language of the warrant delegates to the police officers executing it the function of determining whether the material is obscene."

The Court of Appeals further commented in People v. Abramovitz (supra) as follows:

"The Supreme Court reiterated the need for judicial supervision of seizure of material charged as obscene in Lee Art Theatre v. Virginia (392 U.S. 636); and although this Court has not read that decision as requiring an adversary hearing before a warrant issues (People v. Heller, 20 N.Y. 2d 31) it has undoubtedly become a settled principle that

MEMORANDUM

Indictment No. 538/73

COUNTY COURT, SUFFOLK COUNTY

24

THE PEOPLE OF THE STATE OF NEW
YORK,

BY

J.

VS

DATED

September 30, 19 73

OVERSTOCK BOOK CO., INC.

Page #4

a judge must decide preliminarily whether the particular material on which he is asked to authorize seizure is obscene and that this must not be left open to the judgment of the police."

In the instant case the warrant specifically set forth the titles of the publications to be seized and this Court after scrutinizing each of said publications, made a preliminary determination that each of said publications is obscene, before issuing the warrant.

A further contention by defendant is that the warrant is unlawful and illegal in that the officers used false and misleading names and addresses to obtain copies of the publications. This Court finds said contention to be without merit.

The affidavit also characterizes the direction in the search warrant to seize said business records as a "Mass Seizure". However, the language in the search warrant pertaining to said records restricted the seizure to records disclosing the "individuals responsible for the manufacture, publication or distribution of the aforesaid publications".

In People v. Givens, 21 N.Y. 2d 929 the Court of Appeals approved a search warrant which directed the seizure of: "Books, records and other paraphernalia used for the purpose of operating a loan shark and money lending business".

MEMORANDUM

Indictment No. 552/73

COUNTY COURT, SUFFOLK COUNTY

25

THE PEOPLE OF THE STATE OF NEW
YORK,

BY

J.

VS

DATED September 20,

1973

OVERSTOCK BOOK CO., INC.

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See also: Warden v. Hayden, 387 U.S. 294.

Finally defendant's affidavit alleges that:

"the search went beyond the scope of
the search warrant".

However, no facts are set forth to support said allegation
as required by CPL 710.60.

The motion is denied.

Subpoena order.

FRANK L. GATES

C. J.

26

COUNTY COURT, COUNTY OF SUFFOLK

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, RANO PANAS,
a/k/a GUS, HARRY BROWN and ROBERT BROWN,

Indictment No.
555/72

Defendants.

SIR,

PLEASE TAKE NOTICE that upon the annexed affidavit of
HONORABLE J. J. JARA, attorney for the defendant RANO PANAS, a/k/a GUS,
duly sworn to the 27th day of September, 1972, and upon the
original motion papers to controvert the warrant and to suppress
any evidence obtained by reason thereof as submitted on the 8th
day of August, 1972, and upon the annexed receipt of merchandise
taken by the police who executed the warrant, and upon all of the
papers, pleadings and proceedings heretofore had herein, the under-
signed will move this Court, at a Term for Motions Thereof, to be
held at the Courthouse, Riverhead, New York, on the 11th day of
October, 1972, at 9:30 O'clock in the forenoon of that day, or as
soon thereafter as counsel can be heard, for an order permitting
re-argument of the motion originally returnable August 8, 1972,
and upon such re-argument, vacating the memorandum decision of Hon.
FRANK L. COFFES, and granting a hearing to the defendants in con-
nection with their motion to controvert the warrant issued by this
Court, on the grounds urged in the original motion papers and more
particularly on the additional evidence submitted herein that the
police, in executing the search warrant, went beyond the scope
thereof, and for such other, further and different relief as to this
Court may seem just and proper.

Dated, New York, ~~October~~ October, 1972

Yours, etc.,

FRANK SARISOHN
Attorney for Defendants
OVERSTOCK BOOK CO., INC.,
etc., and ROBERT BROWN
67 Harned Road
Commack, New York, 11725

MORRIS J. EZRA
Attorney for Defendant
BAND PANAS, etc.
225 Broadway
New York, N.Y. 10007

JOEL HIRSCHMORN
Attorney for Defendant
HARRY BROWN
1040 City National Bank
Building
Miami, Florida 33130

TO: Hon. GEORGE J. ASPLAND
District Attorney
County of Suffolk, N.Y.

COURTY COURT 1 COURT OF BUFFOL

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, BANO PANAS,
a/k/a GUS, BARRY BROWN and ROBERT BROWN,

Defendants.

----- X
STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MORRIS J. KIRA, being duly sworn, deposes and says: I am the attorney for the defendant, BANO PANAS. I make and submit this affidavit in support of the within motion for leave to re-argue the motion to controvert the warrant issued by this Court, and, upon such re-argument, to have the Court vacate its memorandum decision dated September 20, 1972 and the order entered thereon, and to grant to the defendants a hearing in support of their original motion which was returnable August 8, 1972.

It is respectfully submitted that the defendants were given no opportunity whatever to bring to the attention of this Court, by way of a hearing on the motion to controvert, that the police had actually exceeded their authority granted to them by the warrant of this court in that they seized more than they were authorized to seize.

Annexed hereto and made part hereof is the receipt of the merchandise taken from the premises of the defendants on March 23, 1972, when the search warrant was executed.

A comparison of the merchandise taken by the police, when compared with the search warrant itself, a copy of which is likewise annexed hereto and made part hereof, will show that items were taken which are not specifically set forth in the

Warrant. Specifically, the items taken which were not included in the warrant are:

Photo Plates of the following publications:

Homosexual Sex Techniques 1 and #2;
 Young boys and oral sex;
 Young boys and sodomy;
 The Art and History of Sex Sadism;
 The Art and History of Fellatio;

And Advertising Photo Plates of the following:

A report on group sex; and
 The New Morality.

From the above it is evident that the warrant was improperly and illegally executed, thus making the warrant ineffectual and void. The receipt for the merchandise taken bears the signature of Det/Inv. Richard E. Cirillo, Shield #30 and cannot be questioned as to its authenticity.

It is respectfully urged that if the original motion papers were found by this Court to be insufficient on their face, as was contended by the District Attorney, that the decision of the Court should have been to deny the motion and to afford the defendants an opportunity to submit proper papers.

It is further urged that to reveal every facet of the reasons set forth in the original motion papers as grounds for the controverting of the warrant would be tantamount to taking away the surprise and effectiveness of the matter that would be brought out at a hearing to controvert the warrant.

The Defendants would further like to question the issuance of the warrant as to points (a) (b) (c) (d) (e) and (f) as raised in the original motion papers without having to reveal the evidentiary matter which a hearing would produce.

Although the Memorandum decision of Judge Gates indicates that he personally scrutinized each of the publications and thereupon determined that there was probable cause for the issuance of the search warrant, it is nevertheless an issue on the

controversion of the search warrant to go into the question of the scrutiny given the subject publications by the Court and to go into the question of probable cause. For the Memorandum decision to merely state that Judge Gates scrutinized the publications is not enough. An opportunity must be given to the defendants to find out the thoroughness of the Judge's scrutiny so as to determine whether probable cause existed for the issuance of the warrant.

Deponent is well aware of the cases cited in the Memorandum decision of Judge Gates and the procedures approved in the Heller and Abramovitz decisions. Suffice it to say that the Heller decision is presently under appeal and until the appeal has been decided, the Heller decision is law only if all the requirements therein set forth have been met.

In view of all the above, and in further view of the fact that defendants are entitled to test the indictments in all their phases, it is respectfully prayed that the within motion to re-argue be granted and that the Memorandum decision and the order entered thereon be vacated, and that the Court order a hearing on defendants' original motion to controvert the warrant.

Sworn to before me this

27th day of September, 1972.

JULIUS L. HAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 411130-05
Qualified in Queens County
Term Expires March 31, 1977

3/ Morris [Signature]

MEMORANDUM

Indictment No. 355/72

COUNTY COURT, SUFFOLK COUNTY

31

THE PEOPLE OF THE STATE OF NEW
YORK,

Plaintiff,

VS

BY Gates J.

DATED November 14, 1972

OVERSTOCK BOOK CO., INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS,
DANO PANAS, GUS, BARRY BROWN and
ROBERT BROWN,

Defendants.

HON. GEORGE J. ASPLAND
District Attorney
Suffolk County
Riverhead, New York

FLOYD SARISON, ESQ.
Attorneys for Defendants
OVERSTOCK BOOK CO., INC., et
and ROBERT BROWN
67 Harned Road
Cohamack, New York 11725

MORRIS J. KZHA, ESQ.
Attorney for Defendant
DANO PANAS, etc.
223 Broadway
New York, New York 10007

JOEL HIRSCHORN, ESQ.
Attorney for Defendant
BARRY BROWN
1040 City National Bank Bldg
Miami, Florida 33130

Motion by defendants to reargue their prior Motion to Controversy
the search warrant issued by this Court and to suppress any evidence
obtained by reason thereof.

The defendants fail to show that additional pertinent facts have
been discovered which could not have been discovered with reasonable
diligence before determination of the motion. CPL 710.40.

In any event the District Attorney has returned the items seized
which were not specifically mentioned in the warrant. Moreover this
Court notes that said items consist of photo plates of publications
which were specifically set forth in the search warrant and found by
this Court to be obscene prior to the issue of said search warrant.

The motion to reargue is granted and upon such reargument the
previous decision of this Court is adhered to.

Submit order.

FRANK L. GATES
C. J.

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At a term of the County Court, Part
III of the County of Suffolk, held
at the Courthouse, Griffing Avenue,
Riverhead, New York, on the 24th
day of November, 1972.

P R E S E N T :

HON. FRANK L. GATES,

County Judge

-----x
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indict.

No. 555/72

OVERSTOCK BOOK CO., INC., a/k/a TIMELY
BOOKS, a/k/a BEAUTIFUL BOOKS, BANO PANAS,
a/k/a GUS, BARRY BROWN and ROBERT BROWN,

Defendants.
-----x

The defendants above named, having moved this
Court by a Notice of Motion dated September 28, 1972 for an
order permitting reargument of a motion to controvert and
suppress originally returnable August 8, 1972, and upon such
reargument vacating the Memorandum Decision of the Honorable
Frank L. Gates and granting a hearing to the defendants, and the
said motion having regularly come before this Court on October 12th
1972, and the matter having been submitted on behalf of the
moving party in support thereof, and by the People of the State
of New York by GEORGE J. ASPLAND, District Attorney of the County
of Suffolk, in opposition thereto,

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AND, on reading and filing the said Notice of Motion, the affidavit of MORRIS J. EZRA, ESQ. in support thereof, sworn to on September 27, 1972, and the memorandum of IRA HARRIS SIMON, ESQ., an Assistant District Attorney of the County of Suffolk, dated October 18, 1972, in opposition thereto, and upon all of the proceedings heretofore had herein, and due deliberation having been had thereon, and the Court having made and filed a decision in writing herein on November 14, 1972,

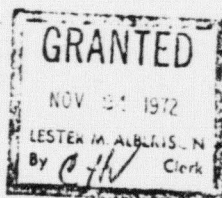
NOW, on motion of GEORGE J. ASPLAND, District Attorney of Suffolk County, it is

ORDERED, that the motion to reargue is granted and upon such reargument the previous decision of this Court is adhered to.

E N T E R,

FRANK L. GATES

County Judge



34

At a term of County Court,
Part III, of the County of
Suffolk, held at the courthouse,
Griffing Avenue, Riverhead,
New York, on the 13th day of
March, 1973.

P R E S E N T :

HON. FRANK L. GATES
County Judge

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

OVERSTOCK BOOK COMPANY, INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS,
SANO PANAS, a/k/a GUS, BARRY BROWN
and ROBERT BROWN,

NOTICE OF RESETTLEMENT
OF ORDER

IND. NO. 555-72

Defendants.
-----X

S I R S :

PLEASE TAKE NOTICE, that the annexed proposed Order
will be presented to JUDGE FRANK L. GATES at a Special Term,
Part III of this Court to be held at the courthouse thereof
located at Riverhead, New York, on the 13th day of March, 1973
at 9 o'clock in the forenoon of that day for Resettlement of an
order previously issued on November 24, 1972 by JUDGE FRANK L.
GATES, a copy of which is attached to and made a part hereof.

Dated: Hauppauge, New York
March __, 1973

Yours etc.,
GEORGE J. ASPLAND
DISTRICT ATTORNEY
SUFFOLK COUNTY

TO: Sarisohn, Thierman & Sarisohn
Attorneys for Defendant
67 Harned Road
Commack, New York 11725
516 543-7667

35

At a term of County Court,
Part III, of the County of
Suffolk, held at the courthouse,
Griffing Avenue, Riverhead,
New York, on the 12 day of
March, 1973

P R E S E N T :

HON. FRANK L. GATES
County Judge

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

OVERSTOCK BOOK COMPANY, INC., a/k/a IND. NO. 555-72
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS,
SAMO PANAS, a/k/a GUS, BARRY BROWN
and ROBERT BROWN,

Defendants.
-----X

The defendants above named, having moved this court by a Notice of Motion dated July 12, 1972 for an Order controverting and repealing a search warrant dated and issued on March 22, 1972 by the HON. FRANK L. GATES, Judge of the County Court, Suffolk County, and surpressing any property obtained as a result of this search warrant, and the said motion having regularly come before this court on October 8, 1972 and the matter haing been submitted on behalf of the moving party in support thereof, and by the People of the State of New York by GEORGE J. ASPLAND, District Attorney, County of Suffolk, in opposition thereto,

AND, on reading and filing the said Notice of Motion, the affidavit of ROBERT BROWN in support thereof, sworn

to on July 8, 1972 and the memorandum of IRA HARRIS SIMON, ESQ., an Assistant District Attorney of the County of Suffolk, dated August 18, 1972 in opposition thereto, and upon all the proceedings heretofore had herein, and due deliberation having been had thereon, and the court having made and filed the decision in writing herein on September 20, 1972.

AND FURTHER, the defendants above named, having moved this court by a Notice of Motion dated September 28, 1972 for an order permitting reargument of the motion to controvert and surpress, and upon such reargument vacating the memorandum decision of the HON. FRANK L. GATES dated September 20, 1972 and granting a hearing to the defendants, and the said motion having regularly come before this court on October 12, 1972, and the matter having been submitted on behalf of the moving party in support thereof, and by the People of the State of New York by GEORGE J. ASPLAND, District Attorney, County of Suffolk, in opposition thereto,

AND, on reading and filing the said Notice of Motion, the affidavit of MORRIS J. EZRA, ESQ., in support thereof, sworn to on ~~December~~ ^{September} 27, 1972, and the memorandum of IRA HARRIS SIMON, ESQ., an Assistant District Attorney, County of Suffolk, dated October 18, 1972, in opposition thereto, and upon all the proceedings heretofore had herein, and due deliberation having been had thereon and the court having made and filed a decision in writing herein on November 14, 1972,

NOW, on motion of GEORGE J. ASPLAND, District

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Attorney of Suffolk County, it is,

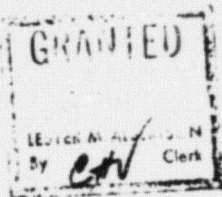
ORDERED, that the motion to controvert and
surpress is denied in all respects, and it is further,

ORDERED, that the motion to reargue is granted
and upon such reargument the previous decision of this court
is adhered to.

E N T E R.

FRANK L. GATES

FRANK L. GATES
COUNTY JUDGE



when the indictment is read to the jury, the dismissed counts will not inadvertently be read.

CLERK: Yes, sir.

THE COURT: Gentlemen, any further applications?

MR. SARISOHN: Your Honor, at this time we request the Court to allow us to move into the area of a hearing on the publications themselves to determine whether or not any of them individually may be classified as being constitutionally protected, and, therefore, not subject to further prosecution as a matter of law.

THE COURT: If there are no objections, I'll permit that.

MR. STONE: Your Honor, I'm sorry. I would like to make an objection for the record.

THE COURT: Yes?

MR. STONE: May it please the Court, the only purpose of an obscenity non vel hearing, as requested by defense counsel, is

to determine whether or not the subject materials are obscene or not obscene. Of course, that is the purpose of the trial.

While it may be true that this is the first time defendants sought an obscenity non vel proceeding, it should be noted that at least three prior occasions, July 7, 1972, April 6, 1973, and September 7, 1973, the defendants made the allegations that the subject materials were not obscene as a matter of law and/or as a matter of fact. Needless to say, on those prior occasions, the defendants' motions had been denied.

The defendants now request a hearing which would in effect afford the defendants a trial before the trial. Such a hearing would result in unnecessary duplication on the part of everyone concerned. For example, it might be appropriate or necessary during such a hearing for the People to demonstrate that the defendants engaged in pandering of a subject material, or it might be appropriate

or necessary to introduce expert testimony. All of these materials--all of these matters will thoroughly be presented during the course of the trial, and I can find no reason why they should be handled in a separate hearing. I would remind the Court these materials were scrutinized by a Judge of this Court and the Grand Jury.

For all of these reasons, the People would respectfully submit the motion should be denied, or in the alternative, that the Court reserve decision until the expert testimony in evidence of pandering has been introduced. Thank you, your Honor.

MR. HIRSCHORN: May I have a moment to consult with Mr. Ezra, your Honor?

THE COURT: Yes.

MR. HIRSCHORN: Your Honor, I speak for all defendants. We previously argued that point, and the law is crystal clear that the defendants are entitled to a Jacobellis (phonetic) versus Ohio hearing.

THE COURT: Do you wish to respond?

MR. STONE: Nothing else, your Honor.

THE COURT: Gentlemen, the Court will consider this application as a motion for inspection of the Grand Jury minutes by the Court to the extent of a determination respecting the adequacy of the evidence before the Grand Jury consisting of the particular volumes submitted as exhibits to the Grand Jury and which form the material constituting the matters set out in the indictment. And if you wish to address yourselves to any of the exhibits which have been previously marked and which have been reviewed by the Court, I will allow you to do so, and I will afford defense counsel such opportunity as they wish in that connection, in addition to any response the District Attorney wishes to make.

MR. SARISOHN: Thank you, your Honor.

THE COURT: We have the exhibits available. I would appreciate your reviewing them to make certain that they are the ones

previously marked, as I believe they are, and that when you refer to them, you refer to the exhibits by number.

Will counsel approach the bench?

(Conference at the bench.)

MR. SARISOHN: If the Court please, I would like to address argument to the publications on an individual basis. I would first like to apprise the Court that my argument on each publication is based upon the three guidelines which, as trier of the facts, we request determination. Those three guidelines as set forth in the statute, that is, as to whether the material, when taken as a whole, violates contemporary community standards; two, whether the material appeals to the prurient interest--

THE COURT: Repeat the second point.

MR. HIRSCHORN: Your Honor, could we get the exact language from the statute?

THE COURT: I want to have Mr. Sarisohn state the precise point he wishes to make in

whatever language he deems appropriate.

MR. HIRSCHORN: If I could suggest--

THE COURT: He may deem it appropriate to state it in whatever fashion he deems appropriate.

MR. SARISOHN: And, thirdly, your Honor--

THE COURT: Could you repeat the second one?

MR. SARISOHN: Whether the material appeals to the prurient interest. And, thirdly, whether the material is utterly, meaning completely, without redeeming social value.

If the Court please, these are the standards, as I understand, set forth in Section 235 of the Penal Law of the State of New York, the first subdivision as to the definition of the word obscene. And, essentially, I have tried to summarize my understanding of those first three, and, of course, I bow to the exact language of the statute of 235 Subdivision 1.

THE COURT: Are you requesting me to

make a finding of fact before precisely the type of finding that I will reach?

MR. SARISOHN: We are requesting the Court that each publication, individually, that the Court find as a matter of law that--

THE COURT: It is just that distinction. I'm not going to make a finding of fact. My finding will only be on a point of law.

MR. SARISOHN: As to whether the material is constitutionally protected or not?

THE COURT: Yes.

MR. SARISOHN: That is what I'm asking the Court to determine. Our argument to the Court is that if in fact the Court finds, for example, that a particular publication does not exceed the community standards or, if in fact the Court were to find, for example, that the material had some social redeeming value, we urge upon the Court the argument then that such material is, as a matter of law, constitutionally protected and the charge or the counts of the indictment pertaining to that

particular publication should be dismissed as a matter of law, and that particular publication should not be submitted to the jury as a matter of constitutional protection.

Your Honor, I would observe to the Court three prior decisions in the lower Court of this particular County--

THE COURT: You have copies to hand up to the bench?

MR. SARISOHN: I'm going to give it to the Court. The first having to do with People versus Neil Albaum, a decision by Judge Mauceri, January 10, 1972, under District Court docket number 4413 of 1969, 6643-68 and 63508 of 1968. And I would request the Court to particularly observe Judge Mauceri's language within that decision, wherein he stated that after a review of the People's exhibits, namely, magazines, which depict females in various states of undress, touching, holding and fondling each other, "It is this Court's personal opinion that they go beyond the limits of candor and

do appeal to the prurient interest but, unfortunately, the Supreme Court of the United States sees these matters differently and has so decided in a great number of cases." As a result the Judge dismissed.

Your Honor, the only copy of that decision I have with me I have underlined. I don't know whether the Court would prefer for me to get a copy that would not be so marked.

THE COURT: Show it to Mr. Stone.

MR. SARISOHN: If the Court desires, I have originals in my office that I can provide, unmarked copies to the Court.

THE COURT: Do you have any objection--

MR. STONE: I have no objection.

THE COURT: --to have him handing that copy to the Court?

MR. STONE: None at all.

THE COURT: What exhibit is that decision referable to?

MR. SARISOHN: Your Honor, I'm not yet referring to a specific exhibit. I will by

the time I get to this third one. I'm laying the groundwork as to the guidelines and approach used by other Courts in this particular County in identical situations.

May I proceed?

THE COURT: Yes.

MR. SARISOHN: The next decision I would want to bring to the Court's attention was that of Judge Auperin, also of our District Court, in the matter of the People of the State of New York against James Kokich, under District Court docket number 9001 of 1971, that was determined on December 28, 1972, approximately eleven, twelve months after Judge Mauceri's decision. And in that particular decision, again this has to do with procedure in general and guidelines in general, Judge Auperin in holding some publications in and dismissing a large quantity of others stated, "And the remaining items, while containing pictures of nude males and females, did not show any sexual contacts and were thus not patently

obscene by today's standards." I have the page here which I have underlined. And it is a two-page memorandum decision on the hearing. The actual original is available to the Court and the District Attorney. These are not as to a specific publication.

The next one I will comment on will be--

THE COURT: Do you have any objection?

MR. STONE: Other than it is incomplete, I have no objection to the markings on the page.

MR. SARISOHN: I'll be glad to get the first page of that to the Court.

If the Court please I'm now addressing myself to a specific publication--before I proceed further, your Honor, before I address myself to a specific individual publication, I would inquire as to whether the Court has, of its own accord, made any preliminary determination that any of the materials are constitutionally protected without argument, so as to avoid what might possibly be a lengthy dissertation on each publications.

THE COURT: I would suggest that you proceed to your argument.

MR. SARISOHN: Then I would at this point--

THE COURT: I will tell you that I have reviewed all of the exhibits.,

MR. SARISOHN: Your Honor, at this time I will proceed specifically to the publication labeled "Intercourse" which appears under the count of the indictment number 147 and 187.

THE COURT: May I suggest you address it by exhibit number. Is it Exhibit 22?

MR. SARISOHN: No, that is Exhibit No. 22, your Honor.

THE COURT: That is what I just asked you.

MR. SARISOHN: I'm sorry. I was engaged in looking at it.

Exhibit 22, which is covered by Indictment No. 147 and 187. As to this specific publication, your Honor, I would call the Court's attention to Judge Newmark's decision

in the District Court on November 28, of 1973, when in a hearing identical to this, with a large number of publications involved, Judge Newmark specifically ruled that this particular publication was not obscene, stating that the publication entitled "Intercourse" consisted of photographs appearing nearer to text material in relation to the sexual one, hence the ruling of the Court. This appeared at Page 61 of the transcript of the trial. At which point the Judge had rendered his decision from the bench. There was no published decision. It would be in the trial transcript.

MR. HIRSCHORN: May I speak to Mr. Sarisohn for a moment, your Honor?

THE COURT: Yes.

(Mr. Hirschorn and Mr. Sarisohn confer.)

MR. SARISOHN: Your Honor, we would submit on this publication that we would rest on Judge Newmark's decision and most respectfully move that this particular publication be declared constitutionally protected and

Indictment Nos. 147 and 187 be dismissed.

THE COURT: Mr. Stone, before you respond, do either of you gentlemen wish to be heard?

MR. HIRSCHORN: No, sir. Not on that one.

MR. EZRA: No, your Honor.

MR. STONE: I would require the case from Mr. Sarisohn.

MR. SARISOHN: People versus Brown tried by Ira Simon before Judge Newmark. The transcript is dated November 28, 1973.

MR. STONE: If the Court wishes, I'll direct myself to this argument of counsel. First, if my recollection is correct, the decision that was rendered by Judge Newmark was a decision that was made after the exhibits had been introduced into evidence and just prior to it being presented to the jury or prior--in any case, after the People had rested in that case. It was not what I consider to be an identical hearing as we

have now. But, moreover, your Honor, I would refer the Court to Hamlin against the United States, wherein the Supreme Court reiterated the long standing rule that the mere fact juries may reach different conclusions as to the same material, does not mean that constitutional rights are abridged.

It is common experience that different jurors may reach different results under any criminal statute, which is simply a consequence of the jury system. The mere fact that it was dismissed by the Court during trial, I do not think alters that standing rule.

Additionally, I would note that there is a question as to the community that may have been involved in that case. I think the decision was a 1973 decision. I don't believe that the principles of res adjudicata are applicable. For if they are, it would indicate to me that any convictions obtained in that case would also have to be almost automatically applied. That is to say that if the defendant

was convicted of promoting a different titled magazine as that defendant was on that date, and he was subsequently arrested for the distribution of the same material, it would seem to me, if we accept the defendants' argument and to apply it fairly to both the People and to the defendant, that it would be just a question as to whether or not it was distributed with knowledge.

I would ask the Court to recognize the judicial principle that decisions of other Courts, except the United States Supreme Court and the Second Circuit Court of Appeals of New York and the New York Court of Appeals, are not binding in any way on this Court.

I would respectfully refer the Court to the case of Grove Press versus Blackwell, 308 Fed. Supp. 361. In that case the United States District Court for the Eastern District of Michigan refused to halt the State's prosecution of the film, "I Am Curious Yellow," in spite of a two-to-one majority decision by

the Court of Appeals that the material is not obscene. The same material was involved in that case, your Honor, identical films. And as noted in that case, this approach has been taken by other trial Courts and by at least one three-Judge District Court.

In those cases it was ruled that a prosecution, a subsequent prosecution and presentment and allowing it to be presented to the jury, does not violate any of the defendant's rights.

That is all I have to say with respect to the argument that "Intercourse" per se is not obscene as a matter of law.

MR. HIRSCHORN: Your Honor, may I reply briefly?

THE COURT: Yes.

MR. HIRSCHORN: I have no idea what the District Attorney's argument has to do with this book. This book poses several photographs and some text dealing with the act of intercourse. There is no explicit sexual material in here.

Simulated, at best. There is no sexual activity depict per se in any of the photographs. There are some photographic descriptions of various forms of intercourse. As a matter of law, under "Roth's Memoirs," this is not obscene.

THE COURT: May I direct your attention to the photograph?

MR. HIRSCHORN: Yes. Which one?

THE COURT: I'm directing your attention to the photograph. I suggest you take a few moments to review the book carefully and, if after your review you wish to pursue that argument, you can do what you deem appropriate.

MR. HIRSCHORN: I have viewed the book on several occasions. The photographs in the book show simulated sexual activities, not express or explicit sexual activities.

MR. EZRA: May I, your Honor?

THE COURT: Of course.

MR. EZRA: I would like to make known to the Court that the publication "Intercourse" was found not obscene in a case of People

against Donald Harvey and others, in the District Court of Denver County on August 28, 1968, by the Honorable Earl A. Wovington (phonetic). And it was again found not to be obscene in the case of United States against Arnold Levy and others, criminal number 12876, in the District of Connecticut by the Honorable Robert C. Sambano (phonetic).

May I say myself, without having any specific dates, I have tried two or three cases involving this book in the County of New York, and on each occasion the book was held not to be obscene. So that we have a number of situations involving this book.

Furthermore, your Honor, with respect to the statement of the District Attorney, the fact that this publication was held not to be obscene in the specific cases which I have cited would give just cause for a legal defense of justification under the statutes. I have no further comments on that, your Honor.

THE COURT: Mr. Stone.

MR. STONE: It appears to me that the question of justification is one of fact and not one of law. I have no further statements, your Honor.

THE COURT: May I suggest that you continue, unless you have any further argument with respect to this particular volume.

MR. SARISOHN: No, your Honor. I would appreciate a ruling on this particular volume, if at all possible.

THE COURT: I'm going to reserve decision until you have concluded all of your arguments on this point.

I would like for you to start with Exhibit 1 and address your argument in sequence.

MR. SARISOHN: I appreciate the Court's request to start with Exhibit 1. The difficulty in addressing my argument in that way will be that it would be seriously disjointed and difficult for me to present it in a cohesive manner because there are similarities of argument that can be applied to a quantity of

these materials without the necessity of arguing the exact same language, the exact same words if I hop, skip and jump around.

MR. HIRSCHORN: Your Honor, could we have a moment, please?

THE COURT: Yes.

MR. HIRSCHORN: Your Honor, may we have a short recess?

THE COURT: How much time do you wish?

MR. HIRSCHORN: Five minutes. May we step outside for five minutes?

THE COURT: Yes, of course.

(Whereupon, a short recess was taken.)

AFTER RECESS

CLERK: Case on trial, People versus Barry Brown, Robert Brown, Overstock Book Company and Bano Panas.

MR. SARISOHN: May I continue, your Honor?

THE COURT: Yes.

MR. SARISOHN: Your Honor, I have advanced

argument as to the publication entitled "Intercourse" marked as Exhibit, People's Exhibit No. 22, and have indicated prior Courts' determinations as has co-counsel. I would further indicate to the Court as to that particular publication that the reasoning and logic for the Courts' favorable determinations in other jurisdictions and lower Courts in this jurisdiction has been predicated upon the accompanying text along with the pictures placing this, in our position, in being that as an educational publication, one which has a degree of redeeming social value, and calling again to the Court's attention the requirement by statute applicable to this case that the publication be utterly without redeeming social value.

I would argue further to the Court that of the subsequent publications there are a large number here which are in an equal situation and have the same logic attached to them, and I would therefore indicate the same

argument that the accompanying text material, having to do with explanation of the pictorial matter, when taken in that viewpoint, has a redeeming social value.

I would particularly make note of Exhibits 18 and 19, in People's Exhibits 18 and 19 for this hearing marked for identification entitled "Marital Sex Practices No. 2" and "Marital Sex Practices No. 1," being quite similar in nature to "Intercourse" and that many of the other publications fall in the same category.

I would also like to call to the Court's attention more specifically publications of the nature of that marked as People's Exhibit for identification No. 33 and 32, namely, "Pictorial Manual of Primary Positions," and "Pictorial Manual of Secondary Positions." In these, there are no accompanying text material. They are mere pictures, or virtually no accompanying text material. And they are mere pictures of naked human beings.

I would call the Court's attention to a well quoted statement that "Nude Is Not Lewd;" and that these at best show simulated sexual intercourse, and publications of this kind have been consistently held to be constitutionally protected.

And, finally, your Honor, I would call to the Court's attention People's Exhibit No. 26 marked for identification, namely, "Party Time," which is even less an accompaniment of the human body, male and female, in a simulated intercourse position, but more primarily that of simply nude males and females painting each other and in accompaniment to each other.

The publications that are in evidence here, we believe that many are similar if not-- are of similar in context, or approach or appeal, and as a result should have the same kind of determination that "Intercourse" should have and has had in so many other jurisdictions, for the reason that these either have redeeming social value or that they have not exceeded

contemporary community standards, or that they do not appeal to the prurient interest.

Any one of these categories would be sufficient to grant constitutional immunity to these publications, and we believe that a careful perusal of each one of them will find matters similar in context or thrust to "Intercourse" or similar to the ones that I have just noted, which have been consistently held throughout this country to be constitutionally protected and not to be hard core pornography, and therefore not subject to prosecution.

Thank you, your Honor.

THE COURT: Do you wish to direct your attention to any of the other exhibits?

MR. SARISOHN: No, your Honor.

MR. HIRSCHORN: Your Honor, with respect to all of the exhibits, it is defendant Brown's position that all of the material are protected as a matter of law and entitled to the Court's determination primarily at this point for such appropriate order of dismissal or exclusion.

Now, your Honor, the correct standard to be applied is that found in New York Statute 245.00 which holds or declares material obscene if considered as a whole. "The predominant appeal is for prurient, shameful or morbid interest, sado-masochism and goes beyond customary limits of candor in describing or representing such matters, and it is utterly without redeeming social value." When you measure Exhibits 1 through 47 in that test, it cannot be said that any one of those magazines is utterly without redeeming social value.

Now, with respect to items 1 through 17, your Honor, the defendant Brown, my client, will rest without making argument on those materials printed as well as the pictorial contents thereof and the lengthy memorandum of law previously submitted to this Court seeking to persuade this Court that the material is not obscene.

With respect to 18 and 19, your Honor, those are marital guides which set forth, in

words and accompanying text, various forms of sexual intercourse. Certainly, your Honor, it cannot be said those materials are utterly without redeeming social value. The sexual activities depict in the photograph is not the gravamen, your Honor, but whether or not the material teaches, communicates, in some way tends to benefit or enlighten mankind and enable him to better understand his relationship with his fellow man or fellow woman.

Insofar as Exhibits 20, 21 are concerned, defendant Brown will rest on those exhibits in the memorandum of law. With respect to Exhibit 22, "Intercourse" previously argued, I adopt the previous argument made.

With respect to Exhibits 23 through 26, the defendant will rest on his arguments made in written form, memorandum form and on the general arguments made here.

THE COURT: You can't incorporate a memorandum into the record. Your memorandum is not part of the record. If you have an

argument that should go on the record, you should address yourself to it.

MR. HIRSCHORN: I have made a general argument.

THE COURT: I understand that. I wish you to understand--

MR. HIRSCHORN: I do.

With respect to Exhibits 23 through 26, the defendant's position is as argued previously, that the material is not utterly without redeeming social value, even though the material may contain and frequently does contain sexual materials.

With respect to Exhibit 27, "Party Time," referred to and looked at by the Court a month ago, that is a single pose simulated--I should say multiple pose magazine that does not show any simulated sexual contact but rather the exposing of the naked bodies which under Pincus versus California, argued previously in the memorandum, Pincus versus the United States and Wiener versus California has been sustained

as not being obscene as a matter of law.

With respect to 28, we take the position that although it contains sexual materials, that it is not without redeeming social value.

With respect to Exhibit 29, that is a male magazine which depicts single or double males in complete state of undress in various states of erection. Your Honor, in the absence of some contrary finding by either the United States Supreme Court or the New York Court of Appeals, a single pose or even dual pose in male magazines are not obscene, as a matter of law.

With respect to Exhibits 30, 31, we suggest those materials are not utterly without redeeming social value.

Exhibits 32, 33, referred to by Mr. Sarisohn, are simulated pictorial manuals-- excuse me, picture manuals of various types of sexual heterosexual positions, primary positions. Exhibit 32, secondary positions. Exhibit 33 and accompanying text, all of which show in an

educational, enlightened, lucid sense, the manner in which intercourse can be engaged in, various varieties and various types of intercourse. Again, those materials are simulated. Even if they were explicit, I would urge the Court that the nature of the material and accompanying text affords those materials the constitutional protection.

THE COURT: You advance the same argument with the other materials that you claim are simulated but made to the viewer to appear to be explicit, particularly Exhibit 27, for example? You claim that that is simulated?

MR. HIRSCHORN: Yes. Perhaps we ought to define what we mean by simulated and explicit, because maybe you and I have a misunderstanding.

By simulated, I'm talking about a photograph which suggests to the viewer or to the recipient of the photograph that there may be sexual converse of some sort or sexual union of some sort being carried on, but does not

in fact appear in the picture. By explicit, I mean a photograph that explicitly photographs or depicts sexual union of one sort or another.

I have looked over "Party Time" several times over the past three and a half years and again, more recently, and I don't recall any simulated sexual activities--I'm sorry, any explicit sexual activities. If I am to be corrected, I am to be corrected. The exhibit will speak for itself.

With respect to Exhibits 34 through 41, we take the same position that even though those materials show explicit sexual contact between male and female, between male and male and between males of varying ages, the accompanying text all in support of the photographs clearly reflect that those materials are not utterly without redeeming social value.

With respect to Exhibit 42, "Tryst," that magazine is a simulated male magazine which again, under the doctrine of Pincus versus the United States, Wiener versus

California, is protected as a matter of law.

Exhibit 43 and Exhibits 45, 46, and 47, are all sexual explicit magazines, your Honor, with supporting text, which the defendants suggest are not utterly without redeeming social value.

Finally, Exhibit 44, "Duet #1," is a heterosexual simulated magazine, that is to say, male and female in simulated positions. I suggest to the Court that under the Roth Memoir standards, simulated materials are not deemed to be obscene. Even if we deem the materials went beyond simulated and into the area of explicitness, so that they might violate Prong 1 and Prong 2 of the Roth Memoirs, the materials in Exhibit 44 are not utterly without redeeming social values.

MR. EZRA: I would merely go along with the arguments advanced by co-counsel, Joel Hirschorn, and, in addition, call the Court's attention to the fact that the decisions in First Amendment cases all hold that all of

the matters, such as, appeal to prurient interest, beyond the community standards, utterly without redeeming social value, all of those must coalesce, and found in each and every respect, with respect to every one of the magazines in this instance, before they can be declared not constitutionally protected.

With respect to some of the magazines involved, without enumerating them by number, I would like to call to the Court's attention the case of Herman against the United States, 259 App. 2nd, 347, a District of Columbia case which involved a group of disconnected scenes portraying or suggesting sexual activities, including repetitive self fondling of female nipples, lesbian like strokes, some display of female genital area and pubic hair and poses suggestive of cunnilingus between a fully dressed man and a partly dressed woman, it was compared to the film "I Am Curious Yellow" and was found not to be obscene.

So that with respect to these magazines

which are suggestive of sex but which do not particularly describe actual sexual involvement, the Court should consider those magazines as being constitutionally protected.

MR. STONE: Your Honor, I will address myself to all 47 subject magazines and books.

THE COURT: Are you going to address them serially or in general?

MR. STONE: In general. My statement applies to all 47.

Your Honor, it has often been said that the average person knows obscene material when he sees it. Nonetheless, the trial and appellate courts have provided us with additional insight in recognizing obscene materials. In *People versus G. I. Distributors, Inc.*, which is found at 20 N. Y. 2nd 104, Judge Breitel, in affirming the defendants' conviction provides a detailed description of the obscene material. The obscene material consisted primarily of photographs of men in various stages of undress who were engaged in

embracing, spanking or enforced disrobing.

I would note for the Court that certiorari was denied by the Supreme Court immediately after the Supreme Court reversed thirteen other cases citing Redrup, and that this decision was subsequent to the case of the People versus Richmond County News, 9 N.Y. 2nd 578, which defined obscenity in terms of hard core pornography.

In People versus Heller, the Court of Appeals held that the film entitled "Blue Movie" is obscene in that it emphasizes to a predominant extent sex acts between people and the lewd exhibition of genitals. The Court also held that "Screw" magazine is clearly obscene by any standard. "Screw" magazine was described as being crammed with photographs of naked men and women engaging in homosexual and heterosexual acts, often with their genitals prominently and lewdly displayed. "Screw" magazine also contained written articles many of which were described

as being totally sex-oriented and written in very graphic terms.

In *People versus Kirkpatrick*, 64 Misc. 2nd 1055, aff'd. 32 N. Y. 2nd 17, the obscene material consisted of heterosexual acts depicting incest, erect male genitals, masturbation, oral sodomy, etc. In *People versus Quentin*, 53 Misc. 2nd 601, material depicting heterosexual intercourse was found to be obscene.

In *People versus Abronovitz*, 38 A. D. 2nd 681, reversed on other grounds, 31 N. Y. 2nd 160, the Court held that the portrayal of close contact between nude males and females thereby indicating sexual activity was obscene.

In *People versus Bercowitz*, 61 Misc. 2nd 974, the play "Che" was found to be obscene in that it depict 23 sexual acts consisting of simulated heterosexual copulation, masturbation, sodomy and simulated defecation.

Of course there are many other cases which describe materials found to be obscene.

However, it might be more fruitful to note that the New York Court of Appeals stated in *People versus Heller*, the type of material which is not prohibited. In the *Heller* decision, the Court noted with approval its prior decisions which held that the mere use of coarse and vulgar language is not obscene and that the photographs of nudes with no indication of sexual activity is also not obscene.

It is respectfully submitted that in the instant case, all of 46 of the subject materials are obscene as a matter of law and as a matter of fact when considering the pandering aspects involved.

Thank you, your Honor.

THE COURT: Do you wish to respond?

MR. SARISOHN: Your Honor, just very briefly. I would like to ask the Court to view also these publications in context with community standards. I would start with just "Intercourse" and ask the Court to view "Intercourse" as opposed to the book entitled

"The Joy of Sex" which has been a number one best seller book of the Book of the Month Club and is prominently displayed on all counters. And I would find that to be similar in context, similar in thrust as "Intercourse" and other publications before the Court. The difference would be perhaps to describe the difference between Harold Robbins and Shakespeare. Robbins is a community standard author and Shakespeare is not. To proscribe the difference in quality as opposed to the context and thrust would be to deny the rights of all authors to speak forward.

I think when we view these against such things as "The Joy of Sex" we find readily these are constitutionally protected.

MR. HIRSCHORN: No additional arguments.

MR. EZRA: No further arguments.

THE COURT: Any response?

MR. STONE: Very briefly. Counsel made reference to a book entitled "Joy of Sex." I don't believe that is before the Court.

I don't know how comparative it is, how similar it is, and it certainly is not here for the Court to review. Also there has been no indication of tolerance or acceptance that has been presented to the Court.

MR. SARISOHN: Your Honor, I would make an offer of proof to bring into the Court the "Joy of Sex" on Monday morning. As far as tolerance, I can't say anything better than to say that it is the best seller as advertised in the New York Times and the number one book in the Book of the Month Club throughout the country.

THE COURT: Decision reserved.

MR. SARISOHN: Would the Court like me to bring in that publication Monday morning?

THE COURT: The Court is engaged in considering everything respecting the matters set out in the indictment.

MR. SARISOHN: I'm not quite sure I follow the Court. Does the Court not desire--

THE COURT: Materials that are subject

that issue is now held in abeyance for a moment, may we carry on briefly with one or two of the other items?

THE COURT: If you would approach the bench first, please.

(Conference at the bench.)

THE COURT: Mr. Stone, I'm going to return the Grand Jury minutes to you at this time.

MR. STONE: Thank you, your Honor.

MR. SARISOHN: Your Honor, in furtherance of our argument having to do with whether or not the publications which have been submitted to the Court are constitutionally protected or not, and in specific, as to that element underlined as "community standards," I would like to at this time tender to the Court a publication called "Joy of Sex," which was published in 1972, which has been publicly advertised in the New York Times. I have one particular ad here, Thursday, January 11, 1973, in which it was a Book of the Month Club

selection and was on the top of the best selling list of all the newspapers and magazines throughout the country for an extended period of time.

I would ask the Court to examine this as a comparative and I'm delivering to the District Attorney, as well, a copy; and for comparative purposes, particularly with such publications specifically as the one "Intercourse" and the others of a similar nature. I would ask the Court to consider those publications which are marked into this case, in view of the "Joy of Sex," as to whether or not they enjoyed the protection of being acceptable throughout the community, meeting community standards and therefore not obscene as a matter of law.

THE COURT: Mr. Stone?

MR. STONE: Your Honor, very briefly.

I would reiterate my prior statement that I don't believe there has been any showing. I don't know if there has been any

showing of similarity or that the materials are comparative.

THE COURT: You also understand that Mr. Sarisohn is not offering this into evidence, because we haven't reached that phase of the trial.

MR. STONE: Other than that, I'll rest on my prior statement.

THE COURT: Do you have any objection to this particular book being marked for identification?

MR. STONE: No objection.

THE COURT: Mark it for identification.

(Book entitled "Joy of Sex," received and marked Defendants' Exhibit A for identification.)

THE COURT: Mr. Stone, at this time you can return the Grand Jury minutes. I thought you needed them for further reference or argument.

MR. STONE: I'll be glad to return them to you.

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(Whereupon, at 3:15 o'clock p.m. the
Court recessed until tomorrow morning at 10:30
o'clock a.m.)

from the Kilpatrick case was Judge Fuld's opinion. But it was the dissenting opinion in that case and he was concurred in by Judge Wachtler, by Judges Jones and Wachtler, who concurred with him in every detail.

THE COURT: Any further response? Any further comment with respect to the Grand Jury minutes or the exhibits?

The Court has considered the motion with respect to the publications which were exhibits before the Grand Jury, and the motion addressed to the adequacy of instructions before the Grand Jury, as motions pursuant to Section C.P.L. 210.30 for the Court's inspection of the Grand Jury minutes.

The Court has read the minutes of the Grand Jury proceedings and finds the evidence sufficient to support the indictment.

Accordingly, the defendants' motions to dismiss are denied.

MR. SARISOHN: Is that as to the corporation too?

THE COURT: It is addressed to all of the motions on that issue.

MR. HIRSCHORN: Just so we have the record clear, I understood the Court to say that you found the evidence to be sufficient--

THE COURT: There is sufficient evidence to support the indictment.

MR. HIRSCHORN: The question is whether or not as a matter of law the Grand Jury instructions were sufficient. That is not a factual matter, it is a legal question.

THE COURT: The minutes related to the instructions and were found sufficient by the Court to support the ensuing indictment.

MR. HIRSCHORN: May I ask the Court to--I ask the Court to attach to the record, in the event an appeal is necessary, as a sealed exhibit, the minutes of the instructions given to the Grand Jury. I think we're entitled to that to appear in the record.

THE COURT: I think that will happen as a matter of law anyway. If that becomes an

issue, the Appellate Courts will call for the minutes, I'm sure.

MR. HIRSCHORN: Let me just state for the record, in the event of a conviction, that will be an issue. So that the integrity of the minutes should be preserved.

THE COURT: Anything further, gentlemen?

MR. EZRA: Will your Honor permit any argument on the question of the obscenity novel?

THE COURT: That is already a part of the decision just rendered.

Are there any other points you wish to argue at this time? Do you gentlemen wish a short recess?

MR. SARISOHN: I'm just not sure if I understood the Court.

THE COURT: I suggest you take a short recess among yourselves.

MR. SARISOHN: That is not necessary. May I inquire of the Court--

THE COURT: No. I would like to proceed.

I would not wish to protract this matter in this form any further.

MR. SARISOHN: I don't want argument.

I have no desire to offer arguments. I'm inquiring of the Court whether the Court has ruled--maybe I did not hear the Court clearly--whether the Court has ruled on the question of obscenity non vel of the publications. I don't recall the decision being placed on the record with that respect. If I'm wrong--

THE COURT: The answer is yes.

MR. SARISOHN: The Court has ruled?

THE COURT: I have ruled with respect to the evidence before the Grand Jury. Those exhibits were evidence before the Grand Jury. And you may ascertain that from the Court reporter by his reading the decision to you again with respect to those exhibits.

Now, can we proceed further, gentlemen?
Do you have any further applications?

MR. SARISOHN: Your Honor, at this time I have another application then to place before

the Court in connection with the pool of jurors which we, I believe, will be requested to choose the jury that will serve on this case.

I have obtained a list of 205 trial jurors drawn in the chambers of the County Judge on Tuesday, September 9, 1975, to serve a term of the Supreme Court, County Court and Surrogate's Court commencing Monday, October 20, 1975.

It is my understanding from the Commissioner of Jurors that if we commence the choosing of a jury prior to Friday of this week, this being Wednesday, there will be 205 from which a panel will be sent to this courtroom in turn from whom we will choose.

I have indicated to the Court that my review of that list, which contains the addresses, I find that more than half of the names therein are from the east end of this County, an area specifically comprising of approximately 20, perhaps 25 per cent of the

the corporation, Overstock Book Company, to enter on behalf of the corporation pleas to four counts of the indictment.

If the Court wishes to take them separately or together--

THE COURT: Yes.

MR. SARISOHN: Which?

THE COURT: Yes, separately, please.

MR. SARISOHN: Does the Court wish to take Robert Brown first?

THE COURT: Yes.

MR. SARISOHN: On behalf of Robert Brown, individually, as an individual defendant, the defendant wishes to offer a plea of guilty to Count 117 of the indictment as charged as a Class D felony and to Count 136 of the indictment as charged as a Class A misdemeanor in full satisfaction of all counts of the indictment.

THE COURT: Do the People wish to be heard?

MR. STONE: Yes, your Honor.

While it is true, your Honor, that this defendant has two prior convictions for obscenity, and that he is believed to be a major national distributor of obscene material, I would nonetheless ask the Court to accept the defendant's pleas to Counts 117 and 136 as charged thereby negating the necessity of a four to six week trial, because the Court still would have sufficient discretion at sentencing.

Again, I would note that if the defendant attempts to withdraw his pleas of guilty before sentencing, the People would oppose such a withdrawal because of prejudice in that another Assistant District Attorney would have to be assigned to prepare and prosecute what I believe to be a lengthy and intricate trial.

Additionally, I would note, your Honor, that the defendant, Robert Brown, is charged in the District Court of Suffolk County under Docket No. 11417-73 with misdemeanors. Those being Obscenities in the Second Degree. And

the People would recommend to the District Court that the defendant be allowed to plead to one Class B misdemeanor in full satisfaction of the information and that any incarceration which the District Court may see fit to impose be made concurrent with any such incarceration this Court may impose. And that would be the recommendation of the People.

MR. SARISOHN: If the Court please, the defendant is aware of the fact that the District Attorney's recommendation will not be binding upon the District Court, and, of course, has no way of binding this Court which does not have jurisdiction of the particular docket number case which the District Attorney refers to.

With the District Attorney's comments upon the record, though, the defendant is satisfied as to what a probable disposition of the District Court case will be and is prepared to go forward with the disposition of this case before your Honor.

THE COURT: You don't contend that if the District Court Judge, upon sentencing, if he does not follow the District Attorney's recommendation, that in some way there is some infirmity in the proceedings now before me?

MR. SARISOHN: We will waive that infirmity.

THE COURT: By waiving it, there is perhaps some inference that an infirmity does exist. And I wish the record to reflect that no infirmity does in fact exist. Because if you feel some infirmity does exist, I wish you would place it on the record now.

MR. SARISOHN: No. From the Court's comments, I thought the Court wanted the defendants to be aware that there might be some infirmity.

THE COURT: There might be some disposition in the District Court which would not be in accord with the recommendation of the District Attorney's recommendation. But I wish to ascertain whether in counsel's mind

or in the defendant's mind that if there should be a different disposition in the District Court, that that occurrence is or is not in your mind an infirmity with respect to the plea being offered here now.

MR. SARISOHN: We do not recognize it as being an infirmity.

THE COURT: Are you Robert Brown, the defendant named in Indictment 555-72?

DEFENDANT ROBERT BROWN: Yes, sir.

THE COURT: Have you heard what your attorney has said in offering to withdraw your previously entered plea of not guilty to the charges in that indictment and instead and in place thereof offering to enter a plea of guilty as charged in Count 117, to wit, to enter a plea of guilty on your behalf to the crime of Obscenity in the First Degree, a Class D felony, and offering, also, to enter a plea of guilty to Count 136 as charged, to wit, to enter a plea of guilty to the crime of Obscenity in the Second Degree, a Class A

misdemeanor; both of these pleas of guilty being entered in full satisfaction of Indictment 555-72?

DEFENDANT ROBERT BROWN: I understand that, sir.

THE COURT: Did you give your attorney your permission to do that?

DEFENDANT ROBERT BROWN: Oh, yes; I did.

THE COURT: The Clerk will now take the defendant's statement of plea.

MR. SARISOHN: Your Honor, I would like the District Attorney to place a recommendation of sentence on the record.

MR. STONE: I would be happy to.

The People are going to recommend to this Court at sentencing that the defendant receive an indeterminate sentence and we will not be any more precise at sentencing other than say indeterminate.

CLERK: Robert Brown, do you understand English?

DEFENDANT ROBERT BROWN: Yes, sir.

CLERK: Have you discussed your case with your lawyer?

DEFENDANT ROBERT BROWN: I have.

CLERK: Did you hear your lawyer offer to withdraw your pleas of not guilty and offer to plead you guilty to Obscenity in the First Degree as charged in Count 117 and Obscenity in the Second Degree as to Count 136 in satisfaction of the indictment?

DEFENDANT ROBERT BROWN: I did.

CLERK: Has any promise been made to you to induce these pleas by the District Attorney, your lawyer, the Clerk of the Court or anyone connected with the Court other than stated on the record?

DEFENDANT ROBERT BROWN: No.

CLERK: Are you pleading guilty of your own free will?

DEFENDANT ROBERT BROWN: I am.

CLERK: Do you know that your pleas of guilty are an admission that you committed the crimes to which you now plead guilty?

DEFENDANT ROBERT BROWN: Yes.

THE COURT: There has been a strike-out and the Clerk has initialled one of the responses.

Would you have the defendant also please initial the strike-out?

(Defendant complies.)

THE COURT: Robert Brown, I show you a document entitled "Statement on Flea." Have you read the questions and answers and is that your signature on the bottom?

DEFENDANT ROBERT BROWN: It is, sir.

THE COURT: Do you wish to make any changes or corrections at this time?

DEFENDANT ROBERT BROWN: No, sir.

THE COURT: Do you understand that by your pleas of guilty you are waiving your right to a jury trial on the charges in the indictment?

DEFENDANT ROBERT BROWN: I do, sir.

THE COURT: Do you understand by your pleas of guilty you are waiving your right

against self-incrimination?

DEFENDANT ROBERT BROWN: I understand that, sir.

THE COURT: Do you understand that by your pleas of guilty you are waiving your right to confront prosecution witnesses against you and to have those witnesses cross examined by your attorney at trial?

DEFENDANT ROBERT BROWN: I understand that too, sir.

THE COURT: Is there anyone forcing you to make this plea at this time?

DEFENDANT ROBERT BROWN: No one.

THE COURT: Do you understand that a plea of guilty is the equivalent of a conviction after trial?

DEFENDANT ROBERT BROWN: I do, sir.

THE COURT: And that your pleas of guilty in this case are the equivalent of your being found guilty on the two charges to which you are entering these pleas?

DEFENDANT ROBERT BROWN: I know this.

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DEFENDANT ROBERT BROWN: I know this.

THE COURT: Has anyone made any promises to you as to what I will do at the time of sentencing?

DEFENDANT ROBERT BROWN: No one has, sir.

THE COURT: Do you understand further that the District Attorney's recommendation is not binding upon the Court?

DEFENDANT ROBERT BROWN: I understand that, sir.

THE COURT: Do you further understand that with respect to the possibility of sentence that this Court has the latitude and discretion to impose a sentence of incarceration for an indeterminate term with a maximum of seven years incarceration?

DEFENDANT ROBERT BROWN: I'm aware of that, sir.

THE COURT: Now, before considering whether to accept your plea of guilty to Count 117 and your plea of guilty to Count 136, would you tell me, first, with respect to Count 117, what you did on or about January 7,

1972, and the place where you did the thing which you describe.

DEFENDANT ROBERT BROWN: Well, it is my business, sir. I'm the only stockholder and president. I sold these books on those dates. Does that answer your Honor's question?

I was aware of the fact that these are sex-oriented magazines and I was aware of the contents of these magazines.

THE COURT: When you say "these magazines--"

DEFENDANT ROBERT BROWN: "The Art of Cunnilingus" and "Young Boys and Oral Sex."

THE COURT: I'm inquiring as to the first title which you describe.

DEFENDANT ROBERT BROWN: I'm sorry, your Honor. I don't understand what your question is.

MR. SARISOHN: I think the defendant has responded as to both--

THE COURT: I'm only asking with respect to Count 117.

DEFENDANT ROBERT BROWN: I thought I had responded that I was aware of the contents of the book.

THE COURT: Will you describe the contents to the Court as you understood them at that time?

DEFENDANT ROBERT BROWN: Well, at this point, your Honor, I have lost familiarity with the title. It's a good two, three years since I have seen it. But just from the title and from the fact it is one of the magazines involved--

THE COURT: Before you proceed, I think it appropriate that your recollection as to a particular document be entirely and fully refreshed. Consequently, I will request the Clerk to provide you with a copy of the particular volume.

DEFENDANT ROBERT BROWN: May I examine it, your Honor?

THE COURT: Yes.

MR. SARISOHN: May it simply be marked

into evidence into the record?

THE COURT: No, I don't think it appropriate for the book to form a part of the minutes in this application.

DEFENDANT ROBERT BROWN: Your Honor, it would appear that at least half or more of the pictures deal with cunnilingus and some with fellatio. There is some nonfiction text that describes more or less what the material is.

THE COURT: Now, you have indicated that you did something with this book or books. What precisely did you do?

DEFENDANT ROBERT BROWN: Well, as president of the corporation I would certainly accept orders for it and ship it for resale.

THE COURT: Where?

DEFENDANT ROBERT BROWN: To the storekeeper who ordered it.

THE COURT: Did you in fact do so?

DEFENDANT ROBERT BROWN: We did so.

THE COURT: Do you have any recollection of the approximate quantity involved?

DEFENDANT ROBERT BROWN: Not specifically, but certainly since we were selling to storekeepers it wouldn't involve--certainly, I would believe more than six.

THE COURT: When you say certainly you would believe, I wish an unequivocal answer with respect to that question.

DEFENDANT ROBERT BROWN: It is extremely difficult because of the lapse of time, your Honor. But if I might say it in my own way, I would like to say that I believe we certainly sold six or more copies at almost any given time that we sold this particular magazine.

THE COURT: And did you sell this particular magazine on more than one occasion?

DEFENDANT ROBERT BROWN: I would believe we probably did, yes.

THE COURT: You say believe and probably.

DEFENDANT ROBERT BROWN: Yes, I would say yes, we did.

MR. SARISOHN: Your Honor, may I address a question to my client at this point for the

record?

THE COURT: Yes.

MR. SARISOHN: Mr. Brown, at the time you were selling these books, particularly on January 7, 1972, were you aware of the contents and character of the book?

DEFENDANT ROBERT BROWN: Yes, I was.

MR. SARISOHN: Were you aware of the fact that the book dealt with sexual materials?

DEFENDANT ROBERT BROWN: Yes, I was.

MR. SARISOHN: At that time did you know that the book was obscene?

DEFENDANT ROBERT BROWN: Absolutely not at that time.

MR. SARISOHN: At this particular time do you understand the books--this book is considered to have a predominant appeal to the interests of sex and having no social redeeming value and going beyond the customary limits of candor?

DEFENDANT ROBERT BROWN: I understand that now.

THE COURT: The book of January 7, 1972, was the predominant appeal of that volume to an interest in sex?

DEFENDANT ROBERT BROWN: Unquestionably.

THE COURT: Did that particular book go substantially beyond the customary limits of candor in describing or representing sexual activity?

DEFENDANT ROBERT BROWN: I would think so now, if we're talking about now. But at that time I did not think so.

THE COURT: Will counsel please approach the bench.

(Conference at the bench.)

MR. SARISOHN: Mr. Brown, you understand now that the books in question--the book in question, in 1972, was considered to have a predominant appeal to an interest in sex and have no redeeming social value and go beyond the customary limits of candor?

DEFENDANT ROBERT BROWN: I didn't know it then but I know it now.

THE COURT: You say you didn't know it then but you know it now. Is your knowledge now that in 1972 the book did have the particular attributes recited by your attorney?

DEFENDANT ROBERT BROWN: It had the same then as it has now. But my understanding of it was different then as it is now.

THE COURT: What is your understanding now as to the attributes in 1972?

DEFENDANT ROBERT BROWN: My understanding now is that it was illegal then just as it is illegal now.

THE COURT: Well, I am not seeking to ascertain your judgement on the law. My question is designed to ascertain from you your knowledge of the contents and attributes of the particular book.

DEFENDANT ROBERT BROWN: Well, I know the content now. I have refreshed my memory by looking at it.

THE COURT: With respect to the attributes recited by your attorney, is it your statement

to the Court that--I wouldn't repeat your statement. I'll allow you to tell me what your thought was.

DEFENDANT ROBERT BROWN: I think I just said to the Court that the book in 1972 is obviously the same book as it is now, nothing has changed within the book, but that I had understood that in 1972 there was nothing wrong with it. I now understand that then in 1972 it was just as wrong as it is now because the book, considered as a whole, had an appeal to the prurient interest and went beyond the customary limits of candor and has no redeeming social value.

THE COURT: Where did you do the particular thing or things that you describe?

DEFENDANT ROBERT BROWN: Deer Park in Suffolk County, Long Island.

THE COURT: Now, directing your attention to Count 136. Will you tell the Court what you did in and about and between October 1 and October 22, 1971, and the place where you did

the thing that you describe.

DEFENDANT ROBERT BROWN: I sold "Young Boys and Oral Sex" at that period of time.

THE COURT: What is that? Is that a title?

DEFENDANT ROBERT BROWN: That is a title of a magazine, during the period October 1, 1971, to October 22, 1971. At this point I'm a little unfamiliar with it. And if you care to ask me any questions about it. I would really like to see the book.

THE COURT: Yes, of course. Your attorney is procuring the copy of the exhibit previously utilized at a hearing.

DEFENDANT ROBERT BROWN: The magazine, your Honor, is about young boys and oral sex, exactly what the title is, showing fellatio, any number of pictures, and a fair amount of nonfiction text that at that time I would have thought was proper text. And that is the content of it.

THE COURT. What did you do with this

book?

DEFENDANT ROBERT BROWN: Sold it whole-sale to any store that would order it.

THE COURT: For what purpose?

DEFENDANT ROBERT BROWN: For the purpose of resale.

MR. SARISOHN: May I inquire at this time?

THE COURT: Yes.

MR. SARISOHN: Mr. Brown, as to the content and character of this book, were you fully familiar with it at the time you were dealing with the book?

DEFENDANT ROBERT BROWN: I was at the time that I was dealing with it, yes.

MR. SARISOHN: As to your understanding of this book concerning its predominant appeal to an interest in sex, the lack of redeeming social value and going beyond customary limits of candor, pursuant to the standards of 1972, is your understanding of that now--

THE COURT: Excuse me, counsellor. This

is alleged to have occurred between October 1 and October 22, 1971.

MR. SARISOHN: I'm sorry. Amending the 1972 to 1971, between October 1st and October 22, is your understanding of this the same as the "Art of Cunnilingus" which you just recited?

DEFENDANT ROBERT BROWN: Identical.

THE COURT: May I have his specific response?

MR. SARISOHN: Do you understand now that the book then had a predominant appeal to an interest in sex, had no redeeming social value and was considered to go beyond the customary limits of candor?

DEFENDANT ROBERT BROWN: I understand that now, although I did not at the time I was selling it.

THE COURT: Is your response you understand now that these attributes existed in 1971?

DEFENDANT ROBERT BROWN: Yes, sir. They existed then as they would now, if I was still

selling them.

THE COURT: How many copies of this particular volume did you have occasion to sell?

DEFENDANT ROBERT BROWN: At least six or more, your Honor.

THE COURT: Robert Brown, how do you now plead to--withdrawn.

Robert Brown, where did the particular act or acts that you just described take place?

DEFENDANT ROBERT BROWN: Leer Park, Suffolk County, New York.

THE COURT: Robert Brown, how do you now plead to the crime of Obscenity in the First Degree, a Class D felony, as charged in Count 117 of Indictment 555-72 and to the crime of Obscenity in the Second Degree, a Class A misdemeanor, as charged in Count 136, both pleas being in full satisfaction of Indictment 555-72?

DEFENDANT ROBERT BROWN: Guilty, your Honor.

THE COURT: You will enter a plea of guilty--

DEFENDANT ROBERT BROWN: To both charges.

THE COURT: I will accept the plea. The Clerk will now take the defendant's pedigree.

(Defendant sworn.)

CLERK: What is your true name?

DEFENDANT ROBERT BROWN: Robert Brown.

CLERK: Where were you born?

DEFENDANT ROBERT BROWN: Bronx, New York.

CLERK: What is your date of birth?

DEFENDANT ROBERT BROWN: February 23,
1916.

CLERK: Are you a citizen of the United States?

DEFENDANT ROBERT BROWN: Yes.

CLERK: Are your parents living?

DEFENDANT ROBERT BROWN: No.

CLERK: Are you married or single?

DEFENDANT ROBERT BROWN: Married.

CLERK: Where do you reside?

DEFENDANT ROBERT BROWN: 2 Pembury Court,

Melville, Long Island.

CLERK: Any previous convictions?

MR. SARISOHN: Defendant stands mute.

THE COURT: What is the defendant's bail status?

MR. SARISOHN: Released in his own custody. And the defendant requests that he be continued.

MR. STONE: No objection, your Honor.

THE COURT: The defendant will be continued in his own recognizance until December 15th, the date fixed for sentence.

Mr. Sarisohn, do you have a further plea or further application?

MR. SARISOHN: On behalf of the defendant--

THE COURT: Before we do that, may I have the two volumes to which reference was made by the witness? Did I say witness? To which reference was made by the defendant, Robert Brown.

Let the record show that the particular volumes have heretofore been marked by this